

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

Agenda E-19 (Appendix F)
Rules
September 2006

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EVIDENCE RULES

To: Honorable David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure

From: Honorable Lee H. Rosenthal, Chair, Advisory Committee on Federal Rules of Civil Procedure

Date: June 2, 2006 (Revised July 20, 2006)

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met in Washington, D.C., on May 22-23, 2006.

* * * * *

Part I of this report presents action items. Subpart A recommends approval for adoption of two sets of proposals. The first is Civil Rule 5.2, the Civil Rules version of the E-Government Rules developed under direction by the Standing Committee Subcommittee on the E-Government Act. The second is the package of Style amendments — [which include] the Style versions of the amended rules on electronic discovery now pending in Congress and scheduled to take effect on December 1, 2006 (Rules 16, 26, 33, 34, 37, and 45).

* * * * *

I. Action Items

A. RULES RECOMMENDED FOR ADOPTION

1. Rule 5.2

The Committee recommends approval for adoption of new Rule 5.2:

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE*

1 **Rule 5.2. Privacy Protection For Filings Made with the**
2 **Court**

3 **(a) Redacted Filings.** Unless the court orders otherwise, in
4 an electronic or paper filing with the court that contains an
5 individual's social-security number, taxpayer-identification
6 number, or birth date, the name of an individual known to be
7 a minor, or a financial-account number, a party or nonparty
8 making the filing may include only:

9 (1) the last four digits of the social-security number and
10 taxpayer-identification number;

11 (2) the year of the individual's birth;

12 (3) the minor's initials; and

13 (4) the last four digits of the financial-account number.

*New material is underlined.

14 **(b) Exemptions from the Redaction Requirement.** The
15 redaction requirement does not apply to the following:

16 (1) a financial-account number that identifies the
17 property allegedly subject to forfeiture in a forfeiture
18 proceeding;

19 (2) the record of an administrative or agency
20 proceeding;

21 (3) the official record of a state-court proceeding;

22 (4) the record of a court or tribunal, if that record was
23 not subject to the redaction requirement when originally
24 filed;

25 (5) a filing covered by Rule 5.2(c) or (d); and

26 (6) a pro se filing in an action brought under 28 U.S.C.
27 §§ 2241, 2254, or 2255.

28 **(c) Limitations on Remote Access to Electronic Files;**
29 **Social-Security Appeals and Immigration Cases.** Unless
30 the court orders otherwise, in an action for benefits under the
31 Social Security Act, and in an action or proceeding relating to
32 an order of removal, to relief from removal, or to immigration
33 benefits or detention, access to an electronic file is authorized
34 as follows:

35 (1) the parties and their attorneys may have remote
36 electronic access to any part of the case file, including the
37 administrative record;

38 (2) any other person may have electronic access to the
39 full record at the courthouse, but may have remote
40 electronic access only to:

41 (A) the docket maintained by the court; and

42 (B) an opinion, order, judgment, or other
43 disposition of the court, but not any other part of the
44 case file or the administrative record.

45 **(d) Filings Made Under Seal.** The court may order that a
46 filing be made under seal without redaction. The court may
47 later unseal the filing or order the person who made the filing
48 to file a redacted version for the public record.

49 **(e) Protective Orders.** For good cause, the court may by
50 order in a case:

51 (1) require redaction of additional information; or

52 (2) limit or prohibit a nonparty's remote electronic
53 access to a document filed with the court.

54 **(f) Option for Additional Unredacted Filing Under Seal.**

55 A person making a redacted filing may also file an unredacted

56 copy under seal. The court must retain the unredacted copy
57 as part of the record.

58 **(g) Option for Filing a Reference List.** A filing that
59 contains redacted information may be filed together with a
60 reference list that identifies each item of redacted information
61 and specifies an appropriate identifier that uniquely
62 corresponds to each item listed. The list must be filed under
63 seal and may be amended as of right. Any reference in the
64 case to a listed identifier will be construed to refer to the
65 corresponding item of information.

66 **(h) Waiver of Protection of Identifiers.** A person waives
67 the protection of Rule 5.2(a) as to the person's own
68 information by filing it without redaction and not under seal.

COMMITTEE NOTE

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules “to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically.” The rule goes further than the E-Government Act in regulating paper filings even when they are not converted to electronic form. But the number of filings that remain in paper form is certain to diminish over time. Most districts scan paper filings into the electronic case file, where they become available to the public in the same way as documents initially filed in electronic form. It is electronic availability, not the form of the initial filing, that raises the privacy and security concerns addressed in the E-Government Act.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. *See* <http://www.privacy.uscourts.gov/Policy.htm>. The Judicial Conference policy is that documents in case files generally should be made available electronically to the same extent they are available at the courthouse, provided that certain “personal data identifiers” are not included in the public file.

While providing for the public filing of some information, such as the last four digits of an account number, the rule does not intend to establish a presumption that this information never could or should be protected. For example, it may well be necessary in individual cases to prevent remote access by nonparties to any part of an account number or social security number. It may also be necessary to protect information not covered by the redaction requirement — such as driver’s license numbers and alien registration numbers — in a particular case. In such cases, protection may be sought under subdivision (d) or (e). Moreover, the Rule does not affect the protection available under other rules, such as Civil Rules 16 and 26(c), or under other sources of protective authority.

Parties must remember that any personal information not otherwise protected by sealing or redaction will be made available over the internet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the party or nonparty making the filing.

Subdivision (c) provides for limited public access in Social Security cases and immigration cases. Those actions are entitled to special treatment due to the prevalence of sensitive information and the volume of filings. Remote electronic access by nonparties is limited to the docket and the written dispositions of the court unless the court orders otherwise. The rule contemplates, however, that nonparties can obtain full access to the case file at the courthouse, including access through the court’s public computer terminal.

Subdivision (d) reflects the interplay between redaction and filing under seal. It does not limit or expand the judicially developed rules that govern sealing. But it does reflect the possibility that redaction may provide an alternative to sealing.

Subdivision (e) provides that the court can by order in a particular case for good cause require more extensive redaction than otherwise required by the Rule. Nothing in this subdivision is intended to affect the limitations on sealing that are otherwise applicable to the court.

Subdivision (f) allows a person who makes a redacted filing to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act.

Subdivision (g) allows the option to file a register of redacted information. This provision is derived from section 205(c)(3)(v) of the E-Government Act, as amended in 2004. In accordance with the E-Government Act, subdivision (g) refers to “redacted” information. The term “redacted” is intended to govern a filing that is prepared with abbreviated identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

Subdivision (h) allows a person to waive the protections of the rule as to that person’s own personal information by filing it unsealed and in unredacted form. One may wish to waive the protection if it is determined that the costs of redaction outweigh the benefits to privacy. If a person files an unredacted identifier by mistake, that person may seek relief from the court.

Trial exhibits are subject to the redaction requirements of Rule 5.2 to the extent they are filed with the court. Trial exhibits that are not initially filed with the court must be redacted in accordance with the rule if and when they are filed as part of an appeal or for other reasons.

Rule as Published

The changes made from Rule 5.2 as published are shown by overstriking and underlining.

Rule 5.2. Privacy Protection For Filings Made with the Court

1 **(a) Redacted Filings.** Unless the court orders otherwise, in
2 an electronic or paper ~~made~~ filing with the court that ~~includes~~
3 contains an individual's social-security number, or an
4 individual's taxpayer-identification number, or birth date, the
5 a name of an individual ~~person~~ known to be a minor, or a
6 financial-account number, a party or nonparty making the
7 filing may include only:

8 (1) the last four digits of the social-security number and
9 taxpayer-identification number;

10 (2) the ~~minor's initials~~ year of the individual's birth;

11 (3) the minor's initials ~~the year of birth~~; and

12 (4) the last four digits of the financial-account number.

13 **(b) Exemptions from the Redaction Requirement.** The
14 redaction requirement of ~~Rule 5.2(a)~~ does not apply to the
15 following:

16 (1) ~~in a forfeiture proceeding~~; a financial-account
17 number that identifies the property allegedly ~~to be~~ subject
18 to forfeiture in a forfeiture proceeding;

- 19 (2) the record of an administrative or agency
20 proceeding;
21 (3) the official record of a state-court proceeding;
22 (4) the record of a court or tribunal ~~whose decision is~~
23 ~~being reviewed~~, if that record was not subject to Rule
24 5.2(a) the redaction requirement when originally filed;
25 (5) a filing covered by Rule 5.2(c) or (d); and
26 (6) a pro se filing ~~made~~ in an action brought under 28
27 U.S.C. §§ 2241, 2254, or 2255.

28 **(c) Limitations on Remote Access to Electronic Files;**
29 **Social-Security Appeals and Immigration Cases.** Unless
30 the court orders otherwise, in an action for benefits under the
31 Social Security Act, and in an action or proceeding relating to
32 an order of removal, relief from removal, or immigration
33 benefits or detention, access to an electronic file is authorized
34 as follows:

- 35 (1) the parties and their attorneys may have remote
36 electronic access to any part of the case file, including the
37 administrative record;

38 (2) any other person may have electronic access to the
39 full record at the courthouse, but may have remote
40 electronic access only to:

41 (A) the docket maintained by the court; and

42 (B) an opinion, order, judgment, or other
43 disposition of the court, but not any other part of the
44 case file or the administrative record.

45 **(d) Filings Made Under Seal.** The court may order that a
46 filing be made under seal without redaction. The court may
47 later unseal the filing or order the person who made the filing
48 to file a redacted version for the public record.

49 **(e) Protective Orders.** ~~If necessary to protect private or~~
50 ~~sensitive information that is not otherwise protected under~~
51 ~~Rule 5.2(a), a~~ For good cause, the court may by order in a
52 case:

53 (1) require redaction of additional information; or

54 (2) limit or prohibit a nonparty's remote electronic
55 access ~~by a nonparty~~ to a document filed with the court.

56 **(f) Option for Additional Unredacted Filing Under Seal.**

57 A ~~party~~ person making a redacted filing ~~under Rule 5.2(a)~~

58 may also file an unredacted copy under seal. The court must
59 retain the unredacted copy as part of the record.

60 **(g) Option for Filing a Reference List.** A filing that
61 contains redacted information ~~redacted under Rule 5.2(a)~~ may
62 be filed together with a reference list that identifies each item
63 of redacted information and specifies an appropriate identifier
64 that uniquely corresponds to each item ~~of redacted~~
65 ~~information~~ listed. The ~~reference~~ list must be filed under seal
66 and may be amended as of right. Any reference in the case to
67 an listed identifier ~~in the reference list~~ will be construed to
68 refer to the corresponding item of information.

69 **(h) Waiver of Protection of Identifiers.** A ~~party~~ person
70 waives the protection of Rule 5.2(a) as to the ~~party's~~ person's
71 own information ~~to the extent that the party files such~~
72 information by filing it without redaction and not under seal
73 ~~and without redaction.~~

Committee Note

The Committee Note was amended only in the paragraph discussing subdivision (e): * * *

Subdivision (e) provides that the court can by order in a particular case for good cause require more extensive redaction than

otherwise required by the Rule, ~~where necessary to protect against disclosure to non-parties of sensitive or private information.~~ Nothing in this subdivision is intended to affect the limitations on sealing that are otherwise applicable to the court.

Changes Made After Publication and Comment

The changes made after publication were made in conjunction with the E-Government Act Subcommittee and the other Advisory Committees.

Subdivision (a) was amended to incorporate a suggestion from the Federal Magistrate Judges Association that the rule text state that the responsibility to redact filings rests on the filer, not the court clerk.

As published, subdivision (b)(6) exempted from redaction all filings in habeas corpus proceedings under 28 U.S.C. §§ 2241, 2254, or 2255. The exemption is revised to apply only to pro se filings. A petitioner represented by counsel, and respondents represented by counsel, must redact under Rule 5.2(a).

Subdivision (e) was published with a standard for protective orders, referring to a need to protect private or sensitive information not otherwise protected by Rule 5.2(a). This standard has been replaced by a general reference to “good cause.”

Discussion

Rule 5.2 was developed under the direction of the Standing Committee Subcommittee on the E-Government Act and in conjunction with the development of parallel rules by the Appellate, Bankruptcy, and Criminal Rules Committees. Many of the choices reflected in the rule are dictated by the Act. The basic approach is further framed by policies recommended by the Committee on Court Administration and Case Management and adopted by the Judicial Conference. The policy is that in most circumstances everyone in the world should have direct access by electronic means to electronically maintained court records under the same rules that apply to in-person access to paper files at the courthouse.

* * * * *

2. The Style Project

The Committee recommends that the Standing Committee approve for adoption each part of the Style Project. There are four parts: . . . and style revisions for the rules that were approved and are scheduled to become effective in December 2006, before the effective date of the Style Rules.

* * * * *

C. The Style Amendments to Rule Amendments Scheduled to take Effect on December 1, 2006

During the extended work on the Style Project, the Judicial Conference and the Supreme Court approved new Rule 5.1, amended Rule 50, and the proposed electronic discovery amendments. If Congress does nothing to disapprove them, these amendments will become effective on December 1, 2006. Although these proposals used many of the Style Project drafting guidelines and principles,

to avoid confusion, they were published and approved as amendments to the existing rules. Minor revisions are required to make them fully consistent with the Style Project. The revisions have been approved by the Standing Committee Style Subcommittee and by the Advisory Committee. As noted, the style revisions to Rules 5.1 and 50 are included in Style Rules 1-86. For clarity, the revisions to Rules 16, 26, 33, 34, 37, and 45 are set out in a separate section of these agenda materials.

* * * * *

Style Amendments to the Electronic Discovery Amendments

Style amendments to Rules 16, 26, 33, 34, 37, and 45 are recommended for approval for adoption as follows:

FEDERAL RULES OF CIVIL PROCEDURE¹

Rule 16. Pretrial Conferences; Scheduling; Management	Rule 16. Pretrial Conferences; Scheduling; Management
<p style="text-align: center;">*****</p> <p>(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time</p>	<p style="text-align: center;">*****</p> <p>(b) Scheduling.</p>
<p>(1) to join other parties and to amend the pleadings;</p> <p>(2) to file motions; and</p> <p>(3) to complete discovery.</p> <p>The scheduling order also may include</p> <p>(4) modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted;</p> <p>(5) provisions for disclosure or discovery of electronically stored information;</p> <p>(6) any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production;</p> <p>(7) the date or dates for conferences before trial, a final pretrial conference, and trial; and</p> <p>(8) any other matters appropriate in the circumstances of the case.</p> <p style="text-align: center;">*****</p>	<p>(3) Contents of the Order.</p> <p>(A) Required Contents. The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.</p> <p>(B) Permitted Contents. The scheduling order may:</p> <p>(i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);</p> <p>(ii) modify the extent of discovery;</p> <p>(iii) provide for disclosure or discovery of electronically stored information;</p> <p>(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced;</p> <p>(v) set dates for pretrial conferences and for trial; and</p> <p>(vi) include other appropriate matters.</p> <p style="text-align: center;">*****</p>

¹ Includes amendments that are scheduled to take effect on December 1, 2006.
Rules App. F-14

Rule 26. General Provisions Governing Discovery; Duty of Disclosure	Rule 26. Duty to Disclose; General Provisions Governing Discovery
(a) Required Disclosures; Methods to Discover Additional Matter.	(a) Required Disclosures.
<p>(1) Initial Disclosures. Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:</p>	<p>(1) Initial Disclosure.</p> <p>(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:</p>
<p>(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;</p>	<p>(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information — along with the subjects of that information — that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;</p>
<p>(B) a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;</p> <p style="text-align: center;">*****</p>	<p>(ii) a copy — or a description by category and location — of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;</p> <p style="text-align: center;">*****</p>
<p>(b) Discovery Scope and Limits.</p> <p style="text-align: center;">*****</p> <p>(1) In General. * * * * * All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).</p>	<p>(b) Discovery Scope and Limits.</p> <p>(1) Scope in General. ***** All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).</p>
(2) Limitations.	(2) Limitations on Frequency and Extent.

<p>(A) By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.</p>	<p>(A) When Permitted. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.</p>
<p>(B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.</p>	<p>(B) Specific Limitations on Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.</p>
<p>(C) The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that:</p> <p style="text-align: center;">* * * * *</p>	<p>(C) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:</p> <p style="text-align: center;">* * * * *</p>
<p>(5) Claims of Privilege or Protection of Trial- Preparation Materials.</p>	<p>(5) Claiming Privilege or Protecting Trial-Preparation Materials.</p>

<p>(A) Information Withheld. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial-preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.</p>	<p>(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:</p> <ul style="list-style-type: none"> (i) expressly make the claim; and (ii) describe the nature of the documents, communications, or things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.
<p>(B) Information Produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.</p> <p style="text-align: center;">*****</p>	<p>(B) Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.</p> <p style="text-align: center;">*****</p>

(f) Conference of Parties; Planning for Discovery. Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), to discuss any issues relating to preserving discoverable information, and to develop a proposed discovery plan that indicates the parties' views and proposals concerning:

(f) Conference of the Parties; Planning for Discovery.

* * * * *

(2) Conference Content; Parties' Responsibilities. In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(4) any issues relating to claims of privilege or of protection as trial-preparation material, including — if the parties agree on a procedure to assert such claims after production — whether to ask the court to include their agreement in an order;

(5) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(6) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).

* * * * *

(3) Discovery Plan. A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

* * * * *

Rule 33. Interrogatories to Parties	Rule 33. Interrogatories to Parties
<p style="text-align: center;">* * * * *</p> <p>(d) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory . . .</p> <p style="text-align: center;">* * * * *</p>	<p style="text-align: center;">* * * * *</p> <p>(d) Option to Produce Business Records. If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:</p> <p style="text-align: center;">* * * * *</p>

<p>Rule 34. Production of Documents, Electronically Stored Information, and Things and Entry Upon Land for Inspection and Other Purposes</p>	<p>Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes</p>
<p>(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test, or sample any designated documents or electronically stored information — including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained — translated, if necessary, by the respondent into reasonably usable form, or to inspect, copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).</p>	<p>(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):</p> <p>(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:</p> <p>(A) any designated documents or electronically stored information — including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations — stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or</p> <p>(B) any designated tangible things; or</p> <p>(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.</p>
<p>(b) Procedure. The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d).</p>	<p>(b) Procedure.</p> <p>(1) Contents of the Request. The request:</p> <p>(A) must describe with reasonable particularity each item or category of items to be inspected;</p> <p>(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and</p> <p>(C) may specify the form or forms in which electronically stored information is to be produced.</p>

The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, stating the reasons for the objection. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. If objection is made to the requested form or forms for producing electronically stored information — or if no form was specified in the request — the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Unless the parties otherwise agree, or the court otherwise orders:

- (i) a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request;
- (ii) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and
- (iii) a party need not produce the same electronically stored information in more than one form.

(2) Responses and Objections.

(D) Responding to a Request for Production of Electronically Stored Information. The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form — or if no form was specified in the request — the party must state the form or forms it intends to use.

(E) Producing the Documents or Electronically Stored Information.

Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

- (i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;
- (ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and
- (iii) A party need not produce the same electronically stored information in more than one form.

Rule 37. Failure to Make Disclosures or Cooperate in Discovery; Sanctions	Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions
<p>*****</p> <p>(f) Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.</p> <p>*****</p>	<p>*****</p> <p>(e) Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.</p>
	<p>(f) Failure to Participate in Framing a Discovery Plan.</p> <p>*****</p>

Rule 45. Subpoena	Rule 45. Subpoena
<p>(a) Form; Issuance.</p> <p>(1) Every subpoena shall</p> <p>(A) state the name of the court from which it is issued; and</p> <p>(B) state the title of the action, the name of the court in which it is pending, and its civil action number; and</p> <p>(C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection, copying, testing, or sampling of designated books, documents, electronically stored information, or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and</p> <p>(D) set forth the text of subdivisions (c) and (d) of this rule.</p>	<p>(a) In General.</p> <p>(1) Form and Contents.</p> <p>(A) Requirements – In General. Every subpoena must:</p> <p>(i) state the court from which it issued;</p> <p>(ii) state the title of the action, the court in which it is pending, and its civil-action number;</p> <p>(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and</p> <p>(iv) set out the text of Rule 45(c) and (d).</p> <p style="text-align: center;">* * * * *</p>
<p>A command to produce evidence or to permit inspection, copying, testing, or sampling may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.</p>	<p>(C) Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information. A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.</p>
	<p>(D) Command to Produce; Included Obligations. A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding party to permit inspection, copying, testing, or sampling of the materials.</p>

<p>(2) A subpoena must issue as follows:</p> <p style="text-align: center;">* * * * *</p>	<p>(2) Issued from Which Court. A</p> <p>subpoena must issue as follows:</p> <p style="text-align: center;">* * * * *</p>
<p>(C) for production, inspection, copying, testing, or sampling, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.</p>	<p>(C) for production or inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.</p>

(b) Service.

(1) A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered. Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).

(2) Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, inspection, copying, testing, or sampling specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, inspection, copying, testing, or sampling specified in the subpoena. When a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place. A subpoena directed to a witness in a foreign country who is a national or resident of the United States shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C. § 1783.

(3) Proof of service when necessary shall be made by filing with the clerk of the court by which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.

(b) Service.

(1) **By Whom; Tendering Fees; Serving a Copy of Certain Subpoenas.** Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served, a notice must be served on each party.

(2) **Service in the United States.** Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:

(A) within the district of the issuing court;

(B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;

(C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or

(D) that the court authorizes on motion and for good cause, if a federal statute so provides.

(3) **Service in a Foreign Country.** 28 U.S.C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(4) **Proof of Service.** Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection, copying, testing, or sampling of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection, copying, testing, or sampling may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to producing any or all of the designated materials or inspection of the premises — or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect, copy, test, or sample the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production, inspection, copying, testing, or sampling. Such an order to compel shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection, copying, testing, or sampling commanded.

* * * * *

(c) Protecting a Person Subject to a Subpoena.

(1) **Avoiding Undue Burden or Expense; Sanctions.** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) **Appearance Not Required.** A person commanded to produce designated documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) **Objections.** A person commanded to produce designated materials or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the designated materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

* * * * *

<p>(d) Duties in Responding to Subpoena.</p> <p>(1) (A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.</p>	<p>(d) Duties in Responding to a Subpoena.</p> <p>(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:</p> <p>(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.</p>
<p>(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.</p>	<p>(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.</p>
<p>(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.</p>	<p>(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.</p>
<p>(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.</p>	<p>(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.</p>

<p>(2) (A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.</p>	<p>(2) Claiming Privilege or Protection.</p> <p>(A) <i>Information Withheld.</i> A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:</p> <ul style="list-style-type: none"> (i) expressly assert the claim; and (ii) describe the nature of the withheld documents, communications, or things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.
<p>(B) If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.</p>	<p>(B) <i>Information Produced.</i> If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.</p>

THE RESTYLED E-DISCOVERY AMENDMENTS

Attached is the package of proposed amendments to Style Rules 16, 26, 33, 34, 37, and 45 to account for the e-discovery amendments to the current Civil Rules that are expected to take effect in December 2006.

The attached document sets out proposed amendments to the Style Rules circulated for public comment in February 2005.

The changes to be made in the February 2005 Style Rules by the Conference-approved e-discovery amendments are shown by single-underlinings and single-strikethroughs. The changes to be made in the e-discovery amendments as part of the current restyling process are shown by double-underlinings and double-strikethroughs.

**AMENDMENTS TO THE FEDERAL
RULES OF CIVIL PROCEDURE***

**Rule 16. Pretrial Conferences; Scheduling;
Management**

* * * * *

(b) Scheduling.

* * * * *

(3) Contents of the Order.

(A) *Required Contents.* The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) *Permitted Contents.* The scheduling order ~~also~~ may ~~include~~:

(i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);

(ii) modify the extent of discovery;

(iii) ~~provisions~~ provide for disclosure or discovery of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production information is produced;

(iii v) set dates for pretrial conferences and for trial; and

* Includes language of proposed amendments published for public comment in August 2005. New material is shown by double-underlinings and omitted material is shown by double-strikethroughs.

(iv vi) include other appropriate matters.

* * * * *

**Rule 26. Duty to Disclose; General Provisions
Governing Discovery**

(a) Required Disclosures.

(1) Initial Disclosure.

(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information — along with the subjects of that information — that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy — or a description by category and location — of all documents, ~~data compilations~~ electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party — who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary

FEDERAL RULES OF CIVIL PROCEDURE

3

material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment or to indemnify or reimburse for payments made to satisfy the judgment.

* * * * *

(b) Discovery Scope and Limits.

(1) Scope in General. * * * * * All discovery is subject to the limitations imposed by Rule 26(b)(2)(B C).

(2) Limitations on Frequency and Extent.

(A) When Permitted. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) Specific Limitations on Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that

showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(B C) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

* * * * *

(5) Claiming Privilege or Protecting Trial-Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(A i) expressly make the claim; and

(B ii) describe the nature of the documents, communications, or things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) Information Produced. If information ~~is~~ produced in discovery ~~that~~ is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified,

a party must promptly return, sequester, or destroy the specified information and any copies it has and may; must not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it ; must take reasonable steps to retrieve it the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(f) Conference of the Parties; Planning for Discovery.

* * * * *

(2) Conference Content; Parties' Responsibilities. In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); to discuss any issues relating to about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a

written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) Discovery Plan. A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues ~~relating to~~ about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(D) any issues ~~relating to~~ about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert ~~such~~ these claims after production — whether to ask the court to include their agreement in an order;

(C E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(D F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

* * * * *

Rule 33. Interrogatories to Parties

* * * * *

(d) Option to Produce Business Records. If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records, (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

* * * * *

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, and copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information — including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations — stored in any medium from

which information can be obtained ~~[em-dash]~~
~~translated~~ either directly or, if necessary, after
translation by the respondent responding party
~~translates them~~ into a reasonably usable form;
 or

(B) any designated tangible things — ~~and to~~
~~test or sample these things~~; or

(2) to permit entry onto designated land or other
 property possessed or controlled by the responding
 party, so that the requesting party may inspect,
 measure, survey, photograph, test, or sample the
 property or any designated object or operation on
 it.

(b) Procedure.

(1) Contents of the Request. The request ~~must~~:

(A) must describe with reasonable
 particularity each item or category of items to
 be inspected; and

(B) must specify a reasonable time, place, and
 manner for the inspection and for performing
 the related acts; and

(C) may specify the form or forms in which
electronically stored information is to be
produced.

(2) Responses and Objections.

* * * * *

(D) **Responding to a Request for Production**
of Electronically Stored Information. ~~If~~
~~objection is made to the~~ The response may

state an objection to a requested form ~~or forms~~ for producing electronically stored information. If the responding party objects to a requested form — or if no form was specified in the request — the ~~responding~~ party must state the form or forms it intends to use.

(D E) Producing the Documents or Electronically Stored Information. ~~Unless the parties otherwise agree, or the court otherwise orders~~ Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) ~~A party producing must produce documents for inspection must produce them~~ A party producing must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) ~~If a request does not specify the a form or forms for producing electronically stored information, a responding party must produce the information it in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable form or forms; and~~ If a request does not specify the a form or forms for producing electronically stored information, a responding party must produce the information it in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable form or forms; and

(iii) ~~A party need not produce the same electronically stored information in more than one form.~~ A party need not produce the same electronically stored information in more than one form.

* * * * *

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

(e) Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

(e f) Failure to Participate in Framing a Discovery Plan. If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

Rule 45. Subpoena

(a) In General.

(1) Form and Contents.

(A) Requirements – In General. Every subpoena must:

- (i)** state the court from which it issued;
- (ii)** state the title of the action, the court in which it is pending, and its civil-action number;
- (iii)** command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce

~~and permit the inspection, and copying, testing, or sampling of designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and~~

(iv) set out the text of Rule 45(c) and (d).

* * * * *

(C) ~~Command to Produce Materials or Permit Inspection Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information.~~

A command to produce documents, electronically stored information, or tangible things or to permit the inspection, copying, testing, or sampling of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(D) ~~Command to Produce; Included Obligations.~~ A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding party to permit inspection, copying, testing, or sampling of the materials.

(2) Issued from Which Court. A subpoena must issue as follows:

(A) for attendance at a hearing or trial, from the court for the district where the hearing or trial is to be held;

(B) for attendance at a deposition, from the court for the district where the deposition is to be taken; and

(C) for production, or inspection, ~~copying, testing, or sampling,~~ if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

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(b) Service.

(1) By Whom; Tendering Fees; Serving a Copy of Certain Subpoenas. Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served, a notice must be served on each party.

(2) Service in the United States. Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:

- (A) within the district of the issuing court;
- (B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection, ~~copying, testing, or sampling~~;
- (C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection, ~~copying, testing, or sampling~~; or
- (D) that the court authorizes on motion and for good cause, if a federal statute so provides.

(3) Service in a Foreign Country. 28 U.S.C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(4) Proof of Service. Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) Protecting a Person Subject to a Subpoena.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may

include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce ~~and permit inspection, copying, testing, or sampling of~~ designated documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce designated materials or to permit inspection, ~~copying, testing, or sampling~~ may serve on the party or attorney designated in the subpoena a written objection to ~~producing inspecting, copying, testing, or sampling~~ any or all of the designated materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production, or inspection, ~~copying, testing, or sampling~~.

(ii) ~~Inspection and copying~~ These acts may be ~~done~~ required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

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(d) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) Producing Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify the a form or forms for producing electronically stored information, a the person responding to a subpoena must produce the information it in a form or forms in which the person it is ordinarily maintains it maintained or in a reasonably usable form or forms that are reasonably usable.

(C) Electronically Stored Information Produced in Only One Form. A The person responding to a subpoena need not produce

the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. ~~A~~ The person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash for a protective order, the person from whom discovery is sought responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(A i) expressly assert the claim; and

(B ii) describe the nature of the withheld documents, communications, or things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information is produced in response to a subpoena that is

subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may; must not use or disclose the information until the claim is resolved. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it; the information if the party disclosed it before being notified; A receiving party and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

CHANGES MADE AFTER PUBLICATION AND COMMENT

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"E-Discovery" Style Amendments: Rules 16, 26, 33, 34, 37, and 45

As noted above, the Style revisions to the “e-discovery” amendments published for comment in 2004, before the Style Project was published for comment in 2005, are all “changes made after publication.” All involve pure style. They can be evaluated by reading the overstrike-underline version set out above.

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